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No. 07-575

IN THE

Supreme Court of the United States

THOMAS CARROLL, WARDEN,

Petitioner,

v.

DAVID STEVENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Respondents, as pretrial detainees, alleged a valid substantive due process claim to be free of punishment sufficient to survive a motion to dismiss.

2. Whether Respondents, as pretrial detainees, alleged a valid procedural due process claim based on the constitutional right to be free from punishment and to avoid indefinite confinement in the highly restrictive and allegedly punitive Security Housing Unit ("SHU") sufficient to survive a motion to dismiss.

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INTRODUCTION

This case involves the application of the Rule 12(b)(6) motion to dismiss standard to a *pro se* complaint. Respondents allege in their Complaint that the State punished them and subjected them to highly restrictive conditions of confinement—in the case of two of the Respondents for almost five years—without any procedural process. The State concedes that Respondents were pretrial detainees and that the Constitution prohibits the State from punishing them. The State also does not dispute that if Respondents' constitutionally protected interests are at risk then some legal process is necessary. The only issues raised by the Petition are whether Respondents' substantive and procedural due process allegations are sufficient to meet the liberal pleading standard. These case-specific questions do not warrant review by this Court.

Indeed, the Third Circuit rightfully concluded that the particular allegations in the Complaint are sufficient to survive a motion to dismiss. Respondents allege, *inter alia*, that they were held in punitive conditions and were allowed out of their cell for only three hours a week. Respondents contend that similarly situated pretrial detainees were not being held in such restrictive confinement. Respondents also contend that they repeatedly asked the State to inform them of the reason for the punitive measures, but that those requests were ignored. Based on these alleged facts, the court of appeals concluded that the allegations raise an inference of "arbitrariness" that warrants further proceedings. The court also concluded that, given the allegations of extremely restrictive confinement, the

State likely should have provided some minimal, non-adversarial process to ensure that such conditions are not mistakenly or arbitrarily imposed.

The Third Circuit's decision is based on this Court's precedent and is consistent with that of the other circuits. This Court, almost thirty years ago, held that the Constitution prohibits imposing conditions or restrictions on pretrial detainees that are punitive or arbitrary. *Bell v. Wolfish*, 441 U.S. 520, 535, 539 (1979). This Court, furthermore, recently held, in a case dealing with convicted and sentenced inmates, that restrictions, similar to those imposed on the Respondents here, required some procedural protection. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). No circuit court that has addressed similarly restrictive conditions has held otherwise and the cases cited by the State to assert a split are factually distinct in material ways.

COUNTER-STATEMENT OF THE CASE

Respondents are three inmates who were housed as pretrial detainees in the Delaware Correctional Center ("DCC"), Security Housing Unit ("SHU") isolation tier. Pet. App. 32, 34. SHU is the most restrictive housing unit in the DCC. SHU is reserved for those inmates who have "demonstrated that they cannot be housed in a lesser security setting and/or whose behavior and history are conducive to maximum security housing." State of Delaware, Delaware Correctional Center, *available at* http://doc.delaware.gov/BOP/PrisonDCC.shtml (last visited December 19, 2007). Placement in the pre-trial SHU is indefinite, limited only by trial and sentencing or the apparent discretion of prison officials. "Inmates, other than those sentenced to the

death penalty, may earn their way out of SHU by exhibiting appropriate behavior, complying with institutional rules and participating in treatment, education, and/or work programs." *Id.* Respondents contend that detainees awaiting trial and sentencing, even for serious crimes, typically are not placed in SHU. Pet. App. 34.

The conditions in SHU are extraordinarily restrictive. Inmates in SHU:

- spend 165 out of 168 hours a week locked in their cells (leaving their cells only for recreation for 45 minutes and a shower for 15 minutes, three days a week);
- can only walk around a small steel cage for recreation and are denied access to any equipment;
- cannot possess art supplies, playing cards, or other mind stimulating activities;
- cannot watch television;
- cannot control the lights in their cells;
- are allowed one 45 minute visit a week, during which the inmate is handcuffed and shackled;
- are permitted one 10 minute phone call a week; and
- cannot attend, participate in, or watch religious services.

Pet. App. 34-36.

SHU inmates, additionally, have no physical access to the law library, but must identify and request materials that may or may not be provided. Pet. App. 35. They are allowed to possess only five cases at a time and must return these cases to get any additional ones. Inmates' access to the

commissary—where stamps, paper and envelopes may be purchased—is limited to one visit every two weeks with a fifteen dollar spending limit. Legal phone calls require twenty-four hour notice.

At the time the Complaint was filed, Respondent Michael Jones was housed in SHU while awaiting trial. Pet. App. 32-33. On or about February 19, 2003, he was moved to SHU, along with several other inmates from Gander Hill Prison, after a disruption at that facility. Pet. App. 32. All of the inmates allegedly involved in that disruption, except Jones, were moved back to Gander Hill or to the B Building pretrial detention center. Jones never received a hearing regarding his initial or continued detention in SHU, and he never received an explanation as to why he was moved to and continued to be housed at SHU, even after he asked for one. At the time the Complaint was filed, Jones had been detained at SHU for over one year. Pet. App. 32-33.

Respondents Michael Manley and David Stevenson were detained in SHU while awaiting sentencing. Pet. App. 33. Manley and Stevenson had been convicted and sentenced to death in January 1997. On or about May 30, 2001, Manley's and Stevenson's sentences were vacated and their cases were remanded for further proceedings. At that time, they were "returned to pre-trial detainee status and moved off the death row tier." Pet. App. 34. Instead of being moved to B Building, which is where other detainees who have had their death sentences vacated have been moved, Plaintiffs were moved to SHU. In December 2003, Stevenson, without explanation, was moved to a less restrictive pre-trial facility. Pet. App. 37. He was moved back to SHU

one month later, in January 2004, again with no explanation or hearing. Like Jones, Manley and Stevenson never received a hearing regarding their initial or continued detention in SHU, were never told why they are being housed in SHU, despite repeated requests, and had no opportunity to challenge their continued detention in the restrictive unit. Pet. App. 34, 37. Stevenson and Manley had been in SHU for almost three years at the time they filed their Complaint in 2004 and were ultimately held in SHU until their resentencing in February 2006, almost five years after their assignment to SHU.

Jones, Stevenson and Manley filed an action under 42 U.S.C. § 1983 on or about February 25, 2004, alleging violations of their substantive and procedural due process rights. Pet. App. 39. Respondents allege they were housed in SHU for punitive purposes and without any explanation or means to challenge their classification or the conditions of confinement. Pet. App. 34, 37.

The State filed a motion to dismiss under Rule 12(b)(6) for failing to state a claim upon which relief can be granted. The State contended that in *Sandin v. Connor*, 515 U.S. 472 (1995), this Court had held that the constitutional liberty interests afforded inmates "are limited to 'freedom from restraint' which imposes an atypical and significant hardship in relation to the ordinary incidents of prison life." Pet. App. 42 (quoting *Sandin*, 515 U.S. at 483-84). Accordingly, the State asserted that Respondents had no constitutionally protected interest at stake and had failed to state a due process claim. The district court granted the State's motion to dismiss, holding

that Respondents failed to allege a facially valid cause of action.

The Third Circuit unanimously reversed and remanded. Pet. App. 2. The court held that because Respondents, as the State has conceded, were pretrial detainees, the district court had erroneously relied upon *Sandin*, 515 U.S. 47, a post-sentencing case, to conclude that Respondents had no constitutional liberty interest at stake. Pet. App. 12 n.4. The court of appeals instead recognized that under *Bell*, 441 U.S. 520, this Court held that pretrial detainees have a substantive due process right not to be punished. Pet. App. 8. The court of appeals concluded that, under *Bell*, Respondents' allegations "intimate a degree of as yet unexplained arbitrariness in the procedures regarding placement in SHU," Pet. App. 11, and raise an "inference of impermissible punishment that precludes granting a motion to dismiss." Pet. App. 12. Although the court noted that reasonable inferences apart from punishment could be drawn from the Complaint as explanation for Respondents' confinement, the fact that such inferences could be drawn was "proof that dismissal was premature." Pet. App. 6. Respondents met their "obligation to provide grounds for . . . relief by presenting factual allegations sufficient to raise their right to relief above a speculative level." Pet. App. 6 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1964-65 (2007)).

The Third Circuit also held that the Complaint sufficiently alleged a valid procedural due process claim. Pet. App. 2, 7, 14. The court concluded, assuming the allegations were true, that Respondents could not be held indefinitely in the

highly restrictive conditions in SHU without some non-adversarial process: "Although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in SHU without explanation or review of their confinement." Pet. App. 14. Recognizing that the degree of process required will vary depending on the reason for the transfer, the Third Circuit remanded to the trial judge to evaluate the purposes of the restrictive confinement and the process that may be required. Pet. App. 16. The court emphasized, however, that when the transfer into such highly restrictive conditions is administrative, as the State contends, only the informal, non-adversarial process outlined by this Court in *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), is necessary, and "[d]ue to the unique exigencies of prison management, . . . the minimal exchange of paperwork . . . need not occur prior to the transfer of a detainee." Pet. App. 17.

REASONS FOR DENYING THE WRIT OF CERTIORARI

There is no compelling reason to review the Third Circuit's fact bound, interlocutory decision that Respondents have alleged claims sufficient to survive a motion to dismiss. With respect to Respondents' substantive due process claim, the State does not contend the courts are confused on whether pretrial detainees may be punished; the State itself concedes the legal point. The Third Circuit did not even conclude that a substantive due process violation had occurred. The entire dispute is over whether Respondents' specific factual allegations of punitive

confinement should survive a Rule 12(b)(6) motion. Furthermore, because the record is not developed and the State has conceded the general legal issues, the Petition presents a poor vehicle for review.

Nor is there any reason to address the Third Circuit's remand of the procedural due process claim. The court's conclusion that Respondents' liberty interests are implicated follows, in part, from the conclusion that a valid substantive due process claim of improper punishment has been alleged. Moreover, the highly restrictive conditions of confinement themselves, even absent an allegation of punishment, support the procedural due process claim. There is no split or demonstrated confusion regarding the scope of procedural due process in any of these contexts. The State cited cases from other circuits that dealt with factually different situations. Not one case involved the type of highly restrictive conditions imposed on the pretrial detainees here. Indeed, the precedent from each of these circuits indicates that if faced with a similar set of facts they would resolve the issue as the Third Circuit did. Likewise, there is no well-defined or developed split among the courts regarding whether *Sandin* applies to pretrial detainees. Every court that has examined the issue has concluded, as the Third Circuit did, that *Sandin* does not apply. The State's alleged split consists of a few unpublished dispositions in which the courts cited *Sandin*, without analysis, in cases involving pretrial detainees. Such unexplained citations do not create a split warranting this Court's attention.

Finally, this decision does not interfere with the State's administration of its prisons. The court

did not prohibit the State from housing detainees in SHU or impose restrictions on what conditions the State may impose. The court simply noted that when pretrial detainees are to be subjected to indefinite confinement—in this case almost five years—in highly restrictive, allegedly punitive conditions, some minimal process is necessary. The process outlined by the court, informing the detainee of the purpose of his confinement in SHU and allowing the detainee to respond, will have a minimal effect on prison management. Many states, in fact, already appear to have such procedures in place.

ARGUMENT

I. THE THIRD CIRCUIT'S CONCLUSION THAT RESPONDENTS ALLEGED A VALID SUBSTANTIVE DUE PROCESS CLAIM SUFFICIENT TO SURVIVE A MOTION TO DISMISS DOES NOT WARRANT THIS COURT'S REVIEW.

A. The Petition Does Not Present A Certworthy Legal Question.

The State mischaracterizes the nature of the Third Circuit's opinion. The State presents the question as whether "[c]ertiorari should be granted to review the Third Circuit's ruling that Respondents' substantive due process rights were violated when they were transferred to the security housing unit." Pet. 23. This question is not presented.

The Third Circuit did not hold that Respondents' substantive due process rights were violated. Nor did the court hold that the State was unjustified in detaining Respondents in SHU. The Third Circuit, instead, held only that Respondents "met their obligation to provide grounds for their entitlement to

relief by presenting factual allegations sufficient to raise their right to relief above a speculative level." Pet. App. 6 (citing *Twombly*, 550 U.S. ___, 127 S. Ct. at 1964-65). The court expressly acknowledged that the State's factual assertions regarding the nature of Respondents' confinement were "legitimate inference[s]," but that such competing inferences underscored that the dismissal was premature. Pet. App. 5-6. The Third Circuit, in other words, decided that these Respondents had pled enough facts about their individual circumstances to survive a Rule 12(b)(6) motion to dismiss, but conceded that the State may ultimately be correct on the merits. This initial fact bound determination does not warrant review.

1. The Petition, in fact, does not raise a dispute over a constitutional standard at all. The State concedes under this Court's precedent that Respondents, as pretrial detainees, may not be punished. Pet. 8, 23; Pet. App. 40; *Bell*, 441 U.S. at 535. As this Court has recognized, both the nature and condition of the confinement, as well as the State's motives, are relevant in determining whether a particular inmate was punished. *Bell*, 441 U.S. at 538-39. This Court further held in *Bell* that "a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees" if the "restriction or condition" is "arbitrary." *Id.* at 539.

Applying this Court's precedent, the Third Circuit held that under the facts alleged, "dismissal was improper" at the motion to dismiss stage "[b]ecause the District Court could not make either an objective

inquiry into the severity of the deprivations or a subjective inquiry into the mental state of the officials." Pet. App. 11.[1] The court also concluded that the Complaint raised issues of "unexplained arbitrariness" on the part of the State. Pet. App. 11. Rather than a legal dispute, this Petition raises merely a dispute over the factual sufficiency of Respondents' allegations.

The Third Circuit's opinion is in line with decisions from other circuits, which have held that when determining whether restrictions are punitive or retaliatory, the motivations of detention officials and circumstances surrounding the restrictions are paramount, as "the same conduct may be the basis for either nonpunitive, regulatory restrictions or punitive sanctions." *Rapier v. Harris*, 172 F.3d 999, 1005 (7th Cir. 1999); *see Surprenant v. Rivas*, 424 F.3d 5, 14-15 (1st Cir. 2005). These determinations, as other circuits have agreed, cannot always be determined at the motion to dismiss stage. *See, e.g.*, *Magluta v. Samples*, 375 F.3d 1269, 1275 (11th Cir. 2004) (reversing grant of motion to dismiss because motivation of prison officials could not be determined).

2. Nor is there a dispute over the appropriate legal standard to apply to a motion to dismiss. The Third Circuit cited this Court's decision in *Twombly*, noting that the allegations in this Complaint were more than mere speculation, and distinguished its own precedent in *Evancho v. Fisher*, 423 F.3d 347 (3d Cir.

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[1] To be sure, the State submitted a conclusory *factual* affidavit disputing the factual allegations in the complaint. Pet. App. 52.

2005), which requires the court to dismiss complaints based only on conclusory, rather than substantiated, factual allegations. The court concluded that this Complaint, for the reasons stated below, was sufficient, particularly in light of the lower standard of pleading that applies to *pro se* plaintiffs, to survive a motion to dismiss. Pet. App. 3-4. These legal standards are uncontroverted. The State's sole contention is that the Third Circuit erred in applying this legal standard to the particular facts alleged in Respondents' Complaint.

B. Respondents Alleged A Factually Sufficient Substantive Due Process Claim.

The court of appeal's decision that dismissal was premature in this case is undoubtedly correct. The Complaint here, as the Third Circuit recognized, is replete with allegations and inferences that raise questions of fact. Respondents allege that the move to SHU was "punitive" and request that the State be enjoined from further "retaliatory practices." Respondents further allege that the conditions in SHU are extremely restrictive. Respondents contend they were locked in their cells 165 out of 168 hours a week—one of them for over a year while awaiting trial and two of them for almost three years while awaiting sentencing.[2] Respondents had no access to exercise equipment and their only recreation was to walk around a steel cage for 45 minutes three times a week. Respondents were denied religious services, even through television, the entire time. They had

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[2] The length of Plaintiffs' detention is relevant to the question of punishment. *Cf. Hutto v. Finney*, 437 U.S. 678, 687 (1978) (noting that unpleasant conditions "might be tolerable for a few days and intolerably cruel for weeks and months").

no physical access to the library and were limited to only receiving materials that they had specifically identified. They were allowed only one visit per week during which time Respondents were handcuffed and shackled. The State itself implies that it uses these restrictive conditions in SHU as punishment, stating on its website that SHU inmates may "earn" the right to return to medium security or general population through good behavior. State of Delaware, Delaware Correctional Center, *available at* http://doc.delaware.gov/BOP/PrisonDCC.shtml (last visited December 19, 2007).

Respondents' allegations that not all similarly situated inmates were housed in SHU further cast doubt on the motives of the state officials. Respondents allege that other inmates who had been convicted of first degree murder and who had death sentences vacated were not housed in SHU. Respondents also allege that they, too, were housed at different times in less restrictive confinement. Respondent Jones alleges that he was housed in the Gander Hill Prison and transferred to SHU, without any explanation or process, only after a disturbance at that facility. All of the other inmates who had been moved to SHU after the disruption, with the exception of Jones, were moved back to Gander Hill or to the B Building pretrial detention center; only Jones was kept in the highly restrictive SHU. Respondent Stevenson also was moved to a less restrictive pretrial facility in December 2003, after his death sentence had been vacated. He was then, without explanation, moved back to SHU one month later in January 2004. The fact that two of the Respondents themselves were housed—in one case even after a determination of guilt and the

imposition of a death sentence—in much less restrictive housing belies the State's assertion that Respondents were placed in SHU solely for security concerns based on their background and warrants further inquiry by the trial court.

C. This Petition Presents A Poor Vehicle To Address Any Substantive Due Process Claims.

This Court, if it were to grant this Petition, would be unable to address with precision any substantive due process claim because of the procedural status of this case. As noted above, even if the Court wanted to address the substantive due process questions as urged by the State, those questions are not presented by this preliminary appeal based on the Rule 12(b)(6) pleading standard. The trial court did not make a determination regarding whether a substantive due process violation occurred. At this stage, the facts regarding the nature and severity of the conditions in SHU and the State's motives for placing Respondents in SHU are still unknown and undeveloped. The Court would have great difficulty in clarifying any substantive legal issues at this stage of the proceedings.

The Court also would have difficulty in addressing the actual question presented: whether Respondents pled sufficient facts to survive a Rule 12(b)(6) motion. As the Third Circuit pointed out, the State concedes that "the complaint alleges that 'Plaintiffs weren't given an explanation for the punitive move.'" Pet. App. 4. The State further concedes, as mentioned above, that punishment is inappropriate for pretrial detainees and that Respondents were in fact pretrial detainees. Pet. App. 8, 40. Under these circumstances, even if the Court were inclined to

address the pleading requirements of *pro se* plaintiffs in the substantive due process context, the inquiry would be exceedingly limited by the State's own concessions on both the facts and substantive law.

II. THE THIRD CIRCUIT'S CONCLUSION THAT RESPONDENTS ALLEGED A VALID PROCEDURAL DUE PROCESS CLAIM SUFFICIENT TO SURVIVE A MOTION TO DISMISS DOES NOT WARRANT THIS COURT'S REVIEW.

The Third Circuit's conclusion that Respondents alleged a valid procedural due process claim similarly does not warrant review. The court, contrary to the State's argument, did not hold that Respondents were improperly placed in SHU or that SHU is inappropriate for some pretrial detainees. Indeed, the court recognized that legitimate institutional interests, including safety and security, may justify the highly restrictive conditions in SHU. Pet. App. 5-6, 15. The Third Circuit simply held, consistent with this Court's precedents, that some minimal legal process be provided if the State wishes to impose these highly restrictive conditions of confinement indefinitely. Pet. App. 16-17; *see also Hewitt*, 459 U.S. at 477 n.9 (noting that "administrative segregation may not be used as a pretext for indefinite confinement" and that "[p]rison officials must engage in some sort of periodic review of the confinement"). This decision is consistent with this Court's precedent and does not create a split among the courts of appeals.

A. Respondents Alleged A Valid Due Process Claim Based On The State's Alleged Punishment.

The Third Circuit, consistent with this Court's precedent, held that Respondents have alleged a valid "liberty interest in being free from punishment while awaiting sentencing and in not being held in the SHU indefinitely." Pet. App. 7. Either of these alleged liberty interests is sufficient to survive a Rule 12(b)(6) motion, because, as this Court has held, some procedural due process protections attach when the State infringes on a constitutionally protected liberty interest. *Hewitt*, 459 U.S. at 466; *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Third Circuit's holding that Respondents have alleged a valid *procedural* due process claim thus, in part, follows from its conclusion that Respondents have alleged a valid *substantive* due process claim. Because Respondents' Complaint alleges a facially valid claim that Respondents were being unconstitutionally punished, at this stage of the case there is a clear constitutionally protected liberty interest at issue and therefore a valid claim for procedural due process.

There also has been no determination or discovery regarding the State's motives. In addition to the difficulties that will arise from the lack of factual development as noted *supra*, for purposes of procedural due process the Third Circuit noted that at least Jones's transfer to SHU raised serious questions as to whether the transfer was for purposes of discipline for violating prison rules. Pet. App. 17. This concern that Jones's assignment to SHU was disciplinary is separate from the court's concerns

that the confinement was punishment for the alleged crime itself. There is no dispute among the courts of appeals that if the State did impose highly restrictive conditions on Respondents for disciplinary reasons that some sort of procedural protection is required. *See Suprenant*, 424 F.3d at 17 (inmate placed in administrative segregation for discipline entitled to procedural process); *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001) ("the [formal] procedures required by *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] apply if the restraint on liberty is imposed for disciplinary reasons"); *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) ("pretrial detainees may be subjected to disciplinary segregation only with a due process hearing"). Respondents allege that they received no process—no reason for their placement in SHU, despite repeated requests, and no opportunity to challenge their placement. These allegations raise an actionable procedural due process claim if the State's motivation was in fact for disciplinary purposes.

This case, accordingly, is a poor vehicle in which to address the State's question regarding the scope of procedural due process. The State seeks review of whether Respondents' allegations of highly restrictive, indefinite confinement raises a procedural due process claim sufficient to survive a motion to dismiss. But, unless this Court is prepared to address and reverse the pleading requirements of a substantive due process claim—notwithstanding the State's concession that the Constitution prohibits punishment of Respondents—and make the factual determination that the conditions were not disciplinary, the decision would have no effect. A valid procedural due process claim would remain.

There is no reason for this Court to grant review of an interlocutory, fact bound Petition that would not even resolve the claims before the district court.

B. Respondents Alleged A Valid Due Process Claim Based On The State's Alleged Indefinite, Highly Restrictive Confinement.

1. This Court's precedent, furthermore, supports the Third Circuit's second determination that Respondents have alleged a valid liberty interest based on the indefinite, highly restrictive conditions in SHU. This Court, in *Austin*, 545 U.S. at 220, held that *sentenced* inmates subjected to similar conditions of confinement had a "constitutionally protected liberty interest in avoiding assignment to OSP [Ohio's supermax prison]." In *Austin*, the inmates in the OSP were kept in their cell 23 out of 24 hours a day and had no control of the lights in their cells. "Opportunities for visitation [we]re rare" and inmates were deprived of almost all human contact. The inmates, who were not eligible for parole while in OSP, were placed in these conditions for an indefinite amount of time, limited only by the length of the sentence and an annual review of the assignment. *Id.* at 214-15.

This Court concluded that the nature of these conditions created a constitutionally protected liberty interest. *Id.* at 223-24. The Court emphasized that although these "harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose to both prison officials and to other prisoners[,] . . . [t]hat necessity . . . does not diminish our conclusion that the conditions give rise

to a liberty interest in their avoidance."[3] *Id.* at 224; *see also Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000) (holding that sentenced inmate had a protected liberty interest from similar restrictive custody).

The conditions in this case—as applied to pretrial detainees—are similar and actually *more* restrictive than those applied to sentenced inmates in *Austin*. In SHU, Respondents were allowed out of their cell only three hours *a week* (four hours less per week than the sentenced inmates in *Austin*). Like the inmates in *Austin*, Respondents could not control the lights in their cells and had minimal visitation rights, even with their attorneys. They were prohibited from possessing any mind stimulating activities, or attending any religious services. Respondents, even though they were awaiting trial and sentencing on first degree murder charges, were unable to visit the law library and had only limited access to materials from the library. Respondents were held indefinitely in these conditions, limited only by an eventual trial and/or sentencing. In this case, two of the Respondents were held in SHU without explanation for almost five years.

The highly restrictive conditions in SHU have far graver potential consequences on pretrial detainees than the conditions in *Austin* had on sentenced inmates. In *Austin*, the only potential consequence was that the sentenced inmates were not eligible for parole while housed in OSP. This Court, however,

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[3] Because Ohio, unlike Delaware, provides its inmates numerous procedural protections, including a three-tier classification review and another review of confinement within thirty days of arrival, the Court ultimately held that procedural due process had been met. *Austin*, 545 U.S. at 225.

has held that inmates have no right to parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Moreover, because OSP houses only those inmates who have been determined through multiple layers of process to be the most dangerous inmates in the system, the possibility of parole is almost nil. Here, these restrictive conditions directly affected Respondents' ability to prepare a defense to the underlying crime and sentence in Jones's case and to the imposition of a death sentence in Stevenson's and Manley's cases. Respondents were literally fighting for their lives with great restrictions on their access to lawyers and legal materials. The harsh restrictions, while they may be necessary and ultimately may be determined to be legitimately related to institutional concerns, should not be imposed without any due process to pretrial detainees.[4]

2. The instant case is far different from the cases from this Court that the State cites, cases which dealt with administrative transfers of sentenced

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[4] The State suggests that because two of the Respondents were held on death row prior to their assignment to SHU these inmates have no constitutionally protected interests. The State's argument is wrong on numerous grounds. First, when Respondents became pretrial detainees, some of their constitutional rights were restored. They could no longer be held in punitive conditions, as they could be on death row. Second, it is the nature of the restrictions themselves, not the destination from which detainees were transferred that creates the constitutionally protected liberty interest. In *Austin*, for example, this Court did not examine the prior conditions of each inmate's confinement before determining that a constitutionally protected interest existed; this Court, instead, examined the conditions in OSP itself.

prisoners between facilities. *See* Pet. 16 (citing *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Olim v. Wakinekona*, 461 U.S. 238 (1983)). The Court held in these cases that sentenced inmates did not have a constitutional interest in being confined in a particular prison population or facility. Not one of these cases dealt with pretrial detainees. Additionally, these cases did not address the imposition of highly restrictive and allegedly punitive conditions of confinement, such as the Court addressed in *Austin* and that are present here. The Third Circuit made the distinction between the administrative transfer cases and this case clear, holding that "although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement." Pet. App. 14.

C. There Is No Circuit Split Regarding Pretrial Detainees' Right To Due Process When Subjected To Highly Restrictive, Punitive Conditions.

1. The Third Circuit did not create or enhance a circuit split regarding the protection of the due process rights of pretrial detainees. The State contends a split now exists between the Third Circuit and the Second, Sixth, Seventh and Ninth Circuits. Pet. 9-12. The State's cases, however, do not demonstrate a split on the law, but merely demonstrate that given different facts, different outcomes will occur.

The State's citation to *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993), for example, is inapposite to the questions presented in this case. *Crane* dealt with a situation where a court failed to issue a mandate and the prisoner's transfer from maximum security was delayed. *Id.* at 137-38. *Crane* did not involve the lengthy, indefinite, allegedly punitive detention at issue here; it involved a delay in housing status while the prison awaited the court's mandate. Additionally, the Seventh Circuit had concluded that the inmate was *not* a pretrial detainee. *Id.* at 139. This holding directly conflicts with the State's concession in this case that Respondents *are* pretrial detainees.[5] Pet. App. 8. Pretrial detainees, under this Court's precedent, have greater constitutional rights than sentenced and convicted inmates, including the right to be free from punishment.[6] *Bell*, 441 U.S. at 535. In fact, in a later opinion dealing with pretrial detainees, the Seventh Circuit held that a pretrial detainee confined in solitary confinement for 270 days, with no phone or

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[5] Although there may be some disagreement between the Seventh and Third Circuits regarding the definition of pretrial detainees, the State conceded that Respondents were pretrial detainees and the Third Circuit noted that concession in its opinion. Pet. App. 8. Respondents' status as pretrial detainees is not before this Court.

[6] The State's citation to a district court opinion within the Third Circuit that the *Crane* court relied upon serves the State no better. Even if *Getch v. Rosenbach*, 700 F. Supp. 1365 (D.N.J. 1988), could support the State's argument, that decision obviously would have been at least implicitly overruled by the Third Circuit's decision here. Moreover, the court in *Getch* expressly noted that the plaintiff failed to even argue that he was subjected to punitive conditions. *Id.* at 1370-71 & n.18.

commissary privileges, no writing materials, and no recreation was entitled to some procedural process. *Rapier*, 172 F.3d at 1002.

Nor is there a demonstrated split with the Sixth Circuit. *Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991), which the State contends evidences a split, dealt with the procedural due process rights of a detainee who was placed in segregated confinement for eight days because reliable sources had warned that the detainee was planning an escape. The court there affirmed the grant of summary judgment because the developed record did not demonstrate any arbitrariness and the action was reasonably related to the legitimate institutional objectives. In contrast, here, the Third Circuit expressly concluded that there are questions of arbitrariness that require further factual development. Moreover, after *Martucci*, when the Sixth Circuit was faced with restrictions similar to those here, as described *supra* in discussing this Court's opinion in *Austin*, the Sixth Circuit concluded that sentenced inmates did possess a constitutionally protected liberty interest in avoiding assignment to OSP. *Austin v. Wilkinson*, 372 F.3d 346, 355 (6th Cir. 2004), *aff'd in part, rev'd in part, by Wilkinson v. Austin*, 545 U.S. 209 (2005).

The State's citation to unpublished opinions in the Second and Ninth Circuits also does not indicate a split. The State's Ninth Circuit cases dealt with routine classification decisions—for which the State already provided hearings—and did not indicate that pretrial detainees would be held in conditions remotely similar to those here. The Second Circuit opinion only held that there was no evidence that the maximum security classification in that case was

unconstitutional punishment under *Bell*. *McMillian v. Cortland County Corr. Facility*, 198 F.3d 234 (table), 1999 WL 753336, *1 (2d Cir. 1999). Both of these circuits have later applied, in published opinions, the *Bell* standard and required procedural protection for disciplinary conditions. *See Benjamin*, 264 F.3d at 183, 188; *Mitchell*, 75 F.3d at 524 n.4; *see also Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986) (holding that initial determination to place a prisoner in administrative segregation requires informal nonadversary hearing within a reasonable time after the prisoner is segregated).

Finally, even assuming *arguendo* that a circuit split does exist, this issue is not ripe for consideration. The asserted split is shallow—according to the State at most only four-to-one—and the circuits have not engaged in any debate or discussion regarding the relative merits of the two positions. The split also would appear to be stale as the two principal cases relied upon by the State are from 1993 and 1991. The landscape of due process rights has been clarified since that time, most notably by *Austin*, which dealt with restrictions similar to SHU here. Further percolation is warranted to determine how the debate develops and to clarify any disagreement on the legal issues.

2. There also is no developed split regarding whether *Sandin v. Conner*, 515 U.S. 472 (1995), applies to claims by pretrial detainees. The State contends there is a four-to-three circuit split on this issue. The five circuit courts that have actually *discussed* the issue and *examined* whether *Sandin* should apply to pretrial detainees, however, have concluded that *Sandin* does not apply to their claims.

See Suprenant, 424 F.3d at 17 ("The courts of appeals that have addressed this question are consentient on the point" that the *Sandin* rationale does not apply to pretrial detainees.); *Benjamin*, 264 F.3d at 189 ("*Sandin* does not apply to pretrial detainees") (internal quotations marks omitted); *Fuentes v. Wagner*, 206 F.3d 335, 341-42 n.9 (3d Cir. 2000) ("*Sandin* does not apply here [to the procedural due process claim of a pretrial detainee]."); *Rapier*, 172 F.3d at 1002 n.2 ("[N]othing in the Supreme Court's decision in *Sandin v. Conner* [ ] alters this fundamental proposition" that a pretrial detainee may not be subjected to any form of punishment for the crime for which he is charged); *Mitchell*, 75 F.3d at 524 ("*Sandin* thus recognizes that its rationale regarding incarcerated prisoners is not applicable to pretrial detainees. *Sandin* leaves *Bell v. Wolfish* untouched.").

The State's alleged split is based on unpublished dispositions in three other circuits that did *not* discuss the issue and did *not* examine whether *Sandin* should apply. Pet. 13. The three opinions relied on by the State are similar in their brevity. The entire due process discussion, as well as the holding, in each case was limited to one or two sentences. Although the courts cite *Sandin* in dealing with pretrial detainees' claims, not one of these unpublished dispositions actually discussed whether *Sandin* should apply and none of them provides any indication that the court considered that there was a question regarding whether *Sandin* should apply. None of these opinions reveals whether, if the courts had considered the question, they would have chosen to apply *Sandin* to the procedural due process claims of pretrial detainees.

It is thus not clear that there is any real disagreement among the circuits that *Sandin* should apply.

D. The Minimal Process Afforded By The Third Circuit Would Not Interfere With Prison Administration Or Discretion.

The minimal legal process suggested by the Third Circuit would not interfere with the State's administration of its prisons. The Third Circuit did not mandate a balancing test or substitute its judgment for that of prison officials. The court, rather, emphasized that prison officials have wide discretion in making housing and security decisions. Pet. App. 18. Under the Third Circuit's opinion, the State need only notify the detainee of reason for the imposition of the highly restrictive conditions and provide an opportunity to respond. Pet. App. 15. This minimal process merely ensures that the State does not act arbitrarily or for purposes of punishment and helps ensure that factual mistakes are not made (*e.g.*, an alleged shoplifter is not accidentally incarcerated in SHU because he has the same name as another violent inmate).[7]

The State's contention that procedural process would be entirely superfluous demonstrates the reason why such process is necessary. The State suggests that because Respondents were charged with first degree murder, any process would be a

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[7] In cases where the transfer is not administrative, but related to discipline, consistent with this Court's opinion in *Wolff*, the court also noted additional process may be needed. Pet. App. 16-17. Because the factual record has not been developed, the reasons for the transfers and the exact nature of the procedures has not and cannot be determined.

"meaningless paperwork task." Pet. 22. Apparently, according to the State, because Respondents were charged with a serious crime, the State may impose any conditions on them for any reason without any procedural protection. Such a contention is directly contrary to this Court's opinion in *Bell* and the law in every circuit to have addressed it. Restrictions on the inmate must be reasonably related to legitimate governmental objectives, which, the Third Circuit concluded, it was unable to determine based on the current record. Pet. App. 18. Indeed, under the particular circumstances of this case, the State's actions appear particularly arbitrary and troubling, as conditions of confinement of at least two of the detainees allegedly *did change*, even though the charge against them did not. Pet. App. 32, 37. Under the allegations of the Complaint, the serious charges against Respondents apparently were not the determinative factor in placing them in SHU as the State has previously represented.

The process suggested here, in fact, is less intrusive than the process provided to the sentenced inmates in *Austin*. In *Austin*, as noted *supra*, Ohio provided multiple levels of initial procedures, appeals and additional reviews of the necessity of the confinement. *Austin*, 545 U.S. at 216-17; *see also Shoats*, 213 F.3d at 142 (inmates received notice of reasons for administrative custody, a hearing, the opportunity to appeal, and review of their status). Indeed, numerous other states already provide their inmates—and most importantly their pretrial detainees—similar minimal due process before imposing highly restrictive confinement. *Compare Jordan v. Fed. Bureau of Prisons*, 191 F. App'x 639 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2875 (2007);

Jones v. Baker, 155 F.3d 810, 811-12 (6th Cir. 1998); *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997). Even the cases cited by the State in its Petition indicate the presence of some regular process when detainees are placed in restrictive housing. *See Garcia v. Pugh*, 8 F.3d 26 (table), 1993 WL 362268, *1 (9th Cir. 1993) (classification hearings conducted); *Alexander v. Frank*, 967 F.2d 583 (table), 1992 WL 149679, *1 (9th Cir. 1992) (detainee received numerous classification hearings). There is no reason Delaware cannot provide some minimal process too.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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